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IN THE UTAH COURT OF APPEALS	
STATE OF UTAH, Plaintiff/Appellee, v. JOHNNIE BASKINS, Defendant/Appellant.	Case No. 20090810

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Assault, a 3rd degree felony, in violation of Utah Code Ann. § 76-5-102 (2009), in the Second Judicial District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a judgment of conviction for Aggravated Assault, a 3rd degree felony, in violation of Utah Code Ann. § 76-5-103 (2009), in the Second Judicial District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF THE ISSUES

Issue I: Whether the trial court failed to properly conform the taking of the guilty plea to the requirements of Rule 11.

Issue II: Whether the trial court properly failed to hear and/or address Mr. Baskins' motion to withdraw guilty plea.

STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENT

This Court reviews whether the trial court complied with the procedural requirements for taking pleas for correctness. State v. Hittle, 2004 UT 46, 94 P.3d 268.

Both issues were preserved by the motion to withdraw guilty plea that Mr. Baskins filed prior to sentencing. (R. 32-35.) This court also has jurisdiction to review Mr. Baskins' "rule 11 claim for plain error because Defendant filed a timely motion to withdraw his guilty plea." State v. Smit, 2004 UT App 222, ¶ 26, 95 P.3d 1203.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This case is governed by Utah Code Ann. § 76-5-102, Utah Code Ann. § 76-5-103, Utah Code Ann. § 77-13-6(2)(a), Utah Code Ann. § 78A-4-103(2)(e), Utah R. Crim. P. R. 11, Utah R. Crim. P. R. 12. It is also governed by the due process provisions of the 14th Amendment to the U.S. Constitution and Article I § 7 of the Utah Constitution.

STATEMENT OF THE CASE

In an Information dated March 2, 2009, the State charged Johnnie Baskins ("Appellant," "Johnnie," "Baskins") with Aggravated Assault, a 3rd degree felony, in violation of Utah Code Ann. § 76-5-103 (2009).

On July 29, 2009, Mr. Baskins entered a plea of guilty to the information. (R. 98.) On August 18, 2009, Mr. Baskins filed a motion to withdraw his guilty plea. (R. 32-35.) On September 2, 2009, in the Second Judicial District Court, State of Utah, the

Honorable Ernie W. Jones, Judge, presiding, the court sentenced Mr. Baskins to a term at the Utah State Prison. (R. 99.) Mr. Baskins filed a timely notice of appeal on September 28, 2009. (R. 60-61.)

STATEMENT OF THE FACTS

On March 2, 2009, the State of Utah charged Johnnie Baskins with Aggravated Assault by information, alleged to have occurred on February 5, 2009. (R. 1.) On July 29, 2009, Mr. Baskins entered into a guilty plea to an orally amended information, charging him with simple assault with priors and substantial bodily injury. (R. 99:3.) The State did not formally amend the information, but indicated it would file an amended information at the time of sentencing. Id. In exchange, the state agreed to dismiss another case. (R. 99:2.) The state agreed to recommend credit for time served. (R. 99:3.) The plea affidavit indicated the elements to the offense were that: "I assaulted another causing substantial injury and I have a prior assault conviction." (R. 23.) The plea affidavit did not contain a recitation of a factual basis for the entry of the guilty plea. (R. 24.)

As the court began to take the plea, the State indicated that it wanted to change the date of the information to February 9, 2009 because "that's the date that there was substantial bodily injury." (R. 99:4.) The state indicated that rather than accepting the plea to the current case, the case being dismissed "would be the one I think that he would be pleading guilty to ..." because it was "the date that we would allege he caused

substantial bodily injury." Id. The state indicated that in that case, Mr. Baskins was alleged to have assaulted the victim causing her to have a "broken jaw." (R. 99:4-5.)

At this point, Mr. Baskins indicated, "I wanna stop this right now." (R. 99:5.) Mr. Baskins' counsel, Mr. Laker, spoke right up. "He's saying that he didn't break her jaw." Id. Mr. Laker disputed whether evidence existed for a broken jaw, at which point, Mr. Baskins interjected, saying, "Hold on. Your Honor, I wanna go to trial. ... I wanna withdraw all this because ... it is gonna put me in a bad space because there was no broken jaw mentioned and they're putting stuff inside of here that's not there, your Honor." (R. 99:6.) Mr. Laker and the court began discussing trial when the defendant interrupted and asked if he could talk with his lawyer alone. (R. 99:7-8.) The court took a recess from this matter and heard other cases. (R. 99:8.)

When the parties returned, Mr. Laker indicated that "he's going to be pleading as I've indicated previously. He is—he is going to admit that there was substantial injury and that he has a prior, but—but that's as far as he's going." (R. 99:8.) The court asked Mr. Baskins whether he agreed and he stated that he did. Id.

The court asked Mr. Baskins whether he had reviewed a written statement and whether he understood that agreement and Mr. Baskins indicated that he had. Id. Mr. Baskins indicated that he had no questions and that he felt like he understood it. (R. 99:9.) The court inquired whether he was under the influence or not and whether he had been pressured to enter into the plea. Id. Mr. Baskins indicated no to both questions. Id.

The court informed Mr. Baskins of the presumption of innocence, of the State's burden of proof and of the right against self-incrimination. Id. Mr. Baskins indicated he understood that he would lose those rights if he were to plead. Id. The court asked whether he was satisfied with his attorney and Mr. Baskins indicated he was. (R. 99:9-10.) Mr. Baskins also indicated he was satisfied with his attorney's advice. (R. 99:10.)

At this point, the state's attorney interjected that he thought Mr. Baskins was not pleading on case ending in 450 but on case ending 279. Id. The court asked whether they were switching the cases and through discussions with counsel, they decided to merely switch the dates on case 450 from February 5 to February 9 and not switch cases. (R. 99:10-11.) Yet Mr. Baskin's attorney indicated, "Now I'm confused." (R. 99:11.) The court said, "I thought it was gonna be 450." Id. Mr. Baskins' attorney said that he agreed with the court. Id. The state indicated that the case could stay at 450, so long as the dates were changed. Id. The court changed the information, then without asking Mr. Baskins whether he understood what had happened, asked, "Again, how do you plead on that?" Id. Mr. Baskins said, "Guilty." Id.

Immediately after this, the court said, "And we've got the right case number and we've got the right charge, right? The assault, third degree felony, with substantial injury and priors." (R. 99:11-12.) Mr. Baskins questioned, "To what?" (R. 99:12) and the court replied, "A third degree felony." Id. Mr. Laker then stated "It's a third degree felony" and Mr. Baskins said, "Right." Id. Then Mr. Baskins said, "But you said the charge was

simple assault." Id. The court said, "Uh-huh, an assault, third degree felony. And I've made the changes on the Information, so—okay?" Id. Mr. Baskins replied, "Uh-huh." Id. At this point, the trial court entered a finding that Mr. Baskins' plea was knowingly and voluntarily made. Id.

About three weeks later, on August 18, 2009[1], Mr. Baskins filed a motion to withdraw his guilty plea. In the motion, he stated six reasons for wanting to withdraw his plea:

1) There exists no real "attorney-client" relationship between myself and counsel which in turn blocks my meaningful access to the court, and disallows my right to be active in my defense.
2) Counsel has failed to show any interest real or otherwise in preparing, developing, or presenting a meaningful defense.
3) Counsel misinformed defendant about the meaning of the term "time served." Defendant believed that the term meant that he would be released, free to go with NO probation, and NO more incarceration time to be served after sentencing.
4) Defendant does dispute and contest the facts of the statements made by the witness and the facts of the officer's report in the discovery.
5) The burden of proof is on the state to show with the evidence beyond a shadow of a doubt that I am guilty. There is NO substantial injury involved.
6) The defendant wants to keep his rights to compel the witnesses to testify under oath at trial.

(R. 32-33.)

Following these recitals, the defendant indicated that he was "misled into believing the nature of the plea deal. There is no plea deal whatsoever! And the defendant petions [sic] the court to keep his constitutional rights to a fair trial." (R. 34.)

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[1] Mr. Baskins dated this motion August 2, 2009 and indicated it was mailed on August 3, 2009, only four days after the plea colloquy. (R. 35.)

On September 2, 2009, the matter came before the trial court for sentencing. (R. 98.)

The court indicated it had received the motion to withdraw the plea and asked Mr. Baskins' new counsel, Mr. Allen, (who was not at the plea) whether he was aware of the motion. (R. 98:2.) Mr. Allen indicated he knew of the motion. Id. "I talked to him about it. There were no grounds under the foundation for being able to do so. ... He had some concerns about the facts of the case ... There's no question he understood what he was doing when he did that, so we're withdrawing the ... " Id. The court specifically asked Mr. Allen if they were withdrawing the motion to withdraw the plea and Mr. Allen said that they were. (R. 98:2-3.) The court then asked Mr. Baskins, "is that what you want to do? I guess you had filled it out yourself or filed it on your own without your attorney?" (R. 98:3.) Mr. Baskins replied with a one word answer: "Yes." Id.

The court went on to hear from the victim's attorney and a victim advocate as well as the state and defense counsel. (R. 98:5-12.) While defense counsel was talking, the court asked "why your client pled guilty if you're essentially telling us now that he didn't cause these injuries." (R. 98:12.) Mr. Allen replied that "it was a compromise plea" because Mr. Baskins would admit that he hit her. (R. 98:12-13.) The court responded that it "makes it difficult for me as a judge to say—you know, I've got a presentence report that said he inflicted the following injuries on her, and now you're saying essentially no,

he didn't, and I got—I'm wondering why he pled guilty if he didn't do any of these things ..." (R. 98:13.)

Mr. Baskins then spoke up and said that there had never been mention before of a broken jaw. (R. 98:14.) Mr. Allen agreed that it was not in the police report. Id. The court then indicated that "I'm just troubled. I mean I hear the advocate saying you won't take responsibility for what happened ..." (R. 98:15.) The court said the presentence report referenced a broken eye socket and a broken nose. (R. 98:16.) "But do you see my concern?" the court questioned, "I'm hearing one thing from the victim. I'm hearing something totally different from the defendant, but as a judge, don't I have to consider the fact that he pled guilty, that he's admitted being responsible and now at sentencing I'm hearing kind of a, 'No, this didn't happen, I didn't do it.'" (R. 98:17.) Mr. Baskins replied that "I did say I smacked her across the face, and that's what I did. ... but what I didn't do, your Honor, I can't even fathom to tell you that I broke her jaw ..." (R. 98:17-18.) Mr. Allen indicated that "there was a fight, that there was an argument, that he reacted badly and struck her. That's why we pled to this." (R. 98:18.)

The parties then discussed restitution with Mr. Baskins continually challenging the parties' recitation of the facts. (R. 98:18-21.) Mr. Allen then stated, "There's no question this was a compromised plea, and that's how Mr. Laker set it up." (R. 98:21.) At this point, the court stated its concerns that Mr. Baskins was not accepting responsibility for what it deemed to be a crime with serious injuries. (R. 98:21-22.) After briefly discussing

Mr. Baskins' history, the court sentenced Mr. Baskins to the Utah State Prison. (R. 98:25.)

SUMMARY OF THE ARGUMENT

Mr. Baskins contends that he did not knowingly and voluntarily enter a guilty plea because the trial court failed to comply with the standards set forth in Rule 11 of the Rules of Criminal Procedure. The trial court engaged in a plea colloquy, which was confusing at best: both counsel and the court jumped back and forth between multiple offenses and various elements for those offenses. The court made no effort to clarify with Mr. Baskins that he understood the elements to the offense to which he was pleading. The trial court has an obligation to make sure that the defendant understands the elements to the offense to which he is pleading. See, Utah R. Crim. P. 11; State v. Alexander, 2009 UT App. 188, 214 P.3d 889. Additionally, the trial court failed to obtain a factual basis for the plea during the colloquy or on the plea affidavit. Had the court asked a few more questions, it could have clarified with Mr. Baskins that he understood the elements to the offense and that he was admitting to a factual basis for that offense. Because of these errors, the trial court committed plain error and this court should find that Mr. Baskins' plea was not knowingly or voluntarily given. Id.

Secondly, if this Court were to find that Mr. Baskins' plea was knowingly and voluntarily given, the trial court needed to take steps to clarify with Mr. Baskins that he truly wanted to withdraw his plea. Mr. Baskins, in his motion to withdraw, indicated a

deterioration of the attorney-client relationship and serious concerns about the voluntariness of his plea. The court took no steps to verify with Mr. Baskins either his willingness to withdraw his motion to withdraw the plea or his dissatisfaction with his counsel and the previous plea colloquy. At a minimum, the court needed to clarify with Mr. Baskins whether it truly was his intent to withdraw the motion. But further than that, the court needed to address the substance of the motion, rule on it and make findings of fact. State v. Humphrey, 2003 UT App. 333, ¶ 10, 79 P.3d 960.

ARGUMENT

I. MR. BASKINS DID NOT KNOWINGLY AND VOLUNTARILY PLEAD GUILTY BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH STANDARDS SET FORTH IN RULE 11 IN THE RULES OF CRIMINAL PROCEDURE

The trial court in this case did not strictly comply with the requirements set forth in Rule 11 of the Rules of Criminal Procedure. As such, defendant could not have made a knowing and voluntary plea.

> "Rule 11 of the Utah Rules of Criminal Procedure governs the entry of guilty pleas." State v. Corwell, 2005 UT 28, ¶ 11, 114 P.3d 569; see also Utah R. Crim. P. 11. The burden of compliance with rule 11 rests squarely upon the trial court, which "means that the trial court [must] personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his . . . constitutional rights." State v. Visser, 2000 UT 88, ¶ 11, 22 P.3d 1242
>
> The trial court's burden in this regard is described "as a duty of strict compliance." Corwell, 2005 UT 28, ¶ 11, 114 P.3d 569. However, strict compliance "does not require that a [trial] court follow a particular script or any other specific method of communicating the rights enumerated by rule 11. To the contrary, strict compliance can be accomplished by multiple means so long as . . . the record

> reflects that the requirement has been fulfilled." Id. ¶ 12. Indeed, "the substantive goal of rule 11 is to ensure that defendants know of their rights and thereby understand the basic consequences of their decision to plead guilty. That goal should not be overshadowed . . . by formalistic ritual." Visser, 2000 UT 88, ¶ 11, 22 P.3d 1242.

State v. Alexander, 2009 UT App. 188, ¶¶ 6-7, 214 P.3d 889 (citation and internal quotation marks omitted).

When reviewing a trial court's denial of a motion to withdraw a guilty plea, this Court not only looks to the plea affidavit, but also to "the record of the plea proceedings, including the plea colloquy and plea affidavit or statement." State v. Dean, 2004 UT 63, ¶12, 95 P.3d 276. In fact, courts "consistently" examine the plea colloquy and "facts and circumstances in which the plea was taken." Id. The Court must decide whether the plea was knowingly and voluntarily made. See, e.g., State v. Ruiz, 2009 UT App 121, ¶ 21, 210 P.3d 955 (citing State v. Munson, 972 P.2d 418, 422 (Utah 1998), State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987), State v. Forsyth, 560 P.2d 337, 338-39 (Utah 1977), and State v. Smit, 2004 UT App 222, ¶ 18, 95 P.3d 1203).

Mr. Baskins contends that this matter was properly preserved in Mr. Baskins' motion to withdraw his plea. Although the motion does not specifically mention a rule 11 violation, the defendant stated that he was not clearly informed of the meaning of parts of the plea agreement. (R. 33.) He also asserted that he was "misled into believing the nature of the plea deal." (R. 34.) These claims lie at the heart of the purpose for rule 11, which is to make sure defendants knowingly and voluntarily enter guilty pleas. The fact that the

defendant's motion references his confusion about the nature of the "deal" shows that his complaint was with the trial court's inadequate plea colloquy.

Yet, even if this court were to find that Mr. Baskins did not properly preserve this issue in his motion to withdraw a plea, because his motion to withdraw a plea was properly filed, this Court has jurisdiction to review the issue for plain error. State v. Smit, 2004 UT App 222, ¶ 26, 95 P.3d 1203. "To demonstrate plain error, a defendant has the burden of showing (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." Id. at ¶ 28.

Defendant contends that by not informing him of the nature and elements of the offense or by not informing him of factual basis of the plea, he has demonstrated a clearly harmful error, which should have been obvious to the court.

A. The Trial Court Failed to Inform the Defendant of the Nature and Elements of the Offense

The trial court failed to inform Mr. Baskins of the "nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements". Id. R. 11(e)(4)(A). The record "must demonstrate that the defendant understands the nature of *each element* of the offense charged." State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993) (emphasis added).

At no point during the colloquy did the court inform Mr. Baskins what the elements were to the crime he was pleading, or that the state bore the burden of proving those elements and that by his plea he would be admitting that conduct.

But not only did the court neglect to inform Mr. Baskins of these rights, there was also substantial confusion about the elements to the offense to which Mr. Baskins was pleading. The first issue of concern revolved around the switching of cases. Defense counsel represented the plea was to a case alleged to have occurred on February 5, 2009 (R. 99:2-4) (also known at case ending 450). The court proceeded with a colloquy to that offense. Mid-colloquy, the state interrupted and said they wanted him to plead to the other case. (R. 99:10-11) (also known as case ending 279). Both the court and defense counsel were confused, indicating they thought he was pleading to a different case. (R. 99:11.) The court then decided to change the dates on the case to which Mr. Baskins was pleading. Id. Then, without asking Mr. Baskins at all about whether he understood what had just happened, the court took his plea. Id. Immediately after the plea, Mr. Baskins asked what charge he had just pled to. (R. 99:11-12.) The court told him that he had pled to a third degree felony and Mr. Baskins stated, "But you said the charge was simple assault." (R. 99:12.) The court then said, "Uh-huh, an assault, third degree felony. And I've made the changes on the Information, so—okay?" Id. Mr. Baskins replied, "Uh-huh." Id.

The dialogue that occurred in this encounter was confusing at best. Mr. Baskins exhibited a clear lack of understanding about what had just happened and the court made no effort to clarify to what offense he had just pled. Telling him that he was pleading to an assault, a third degree felony, is not the same as telling him the elements of assault, nor did the court reference the element of substantial bodily injury, which was the key sticking point for the defendant.

At first, the plea agreement was represented as being to simple assault with substantial bodily injury. (R. 99:3.) Mr. Baskins was clearly confused, equating the term substantial bodily injury to breaking her jaw. (R. 99:5-6.) This concern prompted a recess with the defendant stating clearly that he wanted to go to trial. (R. 99:5-8.) Yet the court failed to indicate to defendant that substantial bodily injury was part of the offense to which he was pleading.

In State v. Alexander, 2009 UT App. 188, 214 P.3d 889, this Court dealt with a case in which a defendant entered a guilty plea to burglary and subsequently moved to withdraw his plea in a timely fashion. Id. ¶ 4. In that case, this Court held that the trial court's failure to comply specifically with Rule 11's requirement of informing the defendant of all the elements of the offense constituted error. Id. ¶ 13. The "trial court was required to ensure that Alexander understood the elements of sexual battery--and that he was pleading guilty to all of those elements--before accepting his guilty plea." Id. ¶ 11. In that case, "the plea affidavit and the plea colloquy contain no discussion of the

elements of sexual battery." Id. ¶ 12. Nor, this Court said, did the court question the defendant about the elements to make sure he understood. Id. Under those circumstances, this Court said, "we simply cannot say that Alexander understood the nature and the elements of the offense ... to which he pleaded guilty." Id. ¶ 13. Because the trial court did not "strictly comply with rule 11 when it accepted Alexander's plea", this Court reversed and remanded the case, ordering Alexander's plea to be withdrawn." Id. ¶¶ 13-14.

The defendant's clear confusion may be a reason for granting a motion to withdraw a plea. See State v. Norris, 2002 UT App 305, 57 P.3d 238, ¶12, quoting State v. Copeland, 765 P.2d 1266 (Utah 1988) ("We conclude 'it is possible that defendant was genuinely and legitimately confused about' the value of these assurances compared with the seriousness of pleading guilty.")

The plea affidavit also inadequately informs the defendant of the elements of assault. It indicated the elements were: "I assaulted another causing substantial injury and I have a prior assault conviction." (R. 23.) The affidavit missed the elements of assault entirely which is "an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Utah Code Ann. § 76-5-102(1)(c). Defendant was entitled to be informed either by the court, or in the signed affidavit, of the elements to which he was pleading. The affidavit did little to

clear up that problem by using the term "assaulted" which does nothing to clarify the elements of the offense.

This case is no different. The defendant was clearly confused—and justifiably so—the court failed to explain the elements of the offense to him, and it is clear on the record the defendant was unclear about which offense he was pleading to. He indicated he thought it was a simple assault and the court confirmed that, but failed to mention the substantial bodily injury, prior conviction or the basic elements of the offense.

Under the plain error standard, the trial court also failed. Defendant has demonstrated a clear error by the court's failure to inform him of the elements of the offense as required by rule 11. This should have been obvious to the court at the time—defendant showed great hesitation and confusion about the offense to which he was pleading. He even mentioned, ""But you said the charge was simple assault." (R. 99:12.) Even the court and counsel were confused. The court's reply to defendant's confusion was to state, "Uh-huh, an assault, third degree felony. And I've made the changes on the Information, so—okay?" Id. One could ask, okay to what charge? The trial court should have been more aware of this issue and taken steps to clarify the defendant's understanding of his plea. The error is clearly harmful because the defendant was forced to enter into a plea to an offense which was not the same in his mind as the one the court was entering.

B. The Trial Court Failed to Obtain a Factual Basis for the Plea

Additionally, the trial court is required to ensure that there is a factual basis for the plea. Utah R. Crim. P. 11(e)(4)(B). To have a factual basis, "the record must reveal either facts that would support the prosecution of a defendant at trial or facts that would suggest a defendant faces a substantial risk of conviction at trial. Thus, a sufficient factual basis requires that the record contain evidence that the crime was committed and that defendant likely committed the crime." State v. Tarnawiecki, 2000 UT App 186, P13, 5 P.3d 1222 (quotations and citation omitted). This factual basis needs to be "recited for the record." State v. Richins, 2004 UT App 36, ¶ 7, 86 P.3d 759.

At no point during the plea colloquy did the court ever take a factual basis from either counsel as to the nature of the offense. The state indicated at one point that in the other case (to which the defendant was not pleading) the defendant was alleged to have struck the victim, breaking her jaw. (R. 99:4-5.) The defendant, during the colloquy, was adamant that he would not admit to breaking her jaw and the subsequent discussion did nothing to clarify whether he was admitting to this factual basis alleged by the prosecutor or if it had changed to a different offense. Right when the court asked the defendant how he pled, the prosecutor said that he wanted it to be to a different case. (R. 99:10-11.) Neither the court nor defense counsel understood this, so the parties kept the current case and amended the dates. Id. The court took no steps to clarify with the defendant if there was a factual basis to support his plea. In fact, the defendant asked after the plea what he

had pled to. (R. 99:12.) The court responded that he had pled to "an assault, third degree felony." Id. The court's response not only failed to convey the actual offense, but made no effort to clarify or obtain a factual basis for the offense.

Rule 11(e)(8) presupposes that the trial court may incorporate the plea affidavit as part of the colloquy. See, e.g., State v. Visser, 2000 UT 88, ¶ 12, 22 P.3d 1242. Yet, the plea affidavit in this case made no mention of a factual basis for the plea—that area is completely blank. (R. 24.) Given the lack of factual basis on the plea affidavit and during the colloquy, there is no way Mr. Baskins had an understanding of what he was supposed to have pled to. The record demonstrates that Mr. Baskins was willing to admit to an assault, but that he was not willing to admit to the factual basis on another case, since he denied breaking the victim's jaw. Cases this Court has upheld have all involved a written statement of the factual basis as part of the plea form. See, e.g., State v. Richins, 2004 UT App. 36, 86 P.3d 759; see also, State v. Tarnawiecki, 2000 UT App 186; 5 P.3d 1222 (finding plain error when trial court failed to inform the defendant of his right to a speedy trial in both the colloquy and the affidavit).

This case is no different than the Tarnawiecki case in which the trial court's failure to obtain critical information, in this case a factual basis for the plea, constituted plain error. See id. (in Tarnawiecki the error was a failure to inform the defendant of his right to a speedy trial). The rule plainly requires a factual basis, and it is cases like this one, in

which the defendant plainly shows a lack of understanding or confusion about the plea, where the court should have taken steps to ensure he understood.

The trial court's failure to clarify either the elements of the offense to which the defendant was pleading or to recite a factual basis for the plea constituted plain error. See id. It assures that Mr. Baskins' plea was not knowingly or voluntarily given. State v. Alexander, 2009 UT App. 188, ¶¶ 6-7, 214 P.3d 889.

II. THE TRIAL COURT SHOULD HAVE CLARIFIED WITH MR. BASKINS WHETHER HE WISHED TO WITHDRAW HIS GUILTY PLEA AND THE COURT SHOULD HAVE RULED ON THE SUBSTANCE OF THE MOTION

Even if this Court were to hold that the plea was validly entered, the trial court should have heard Mr. Baskins about his properly filed motion to withdraw the plea or at least ruled on the motion. If the court reaches this issue, Mr. Baskins asks this Court to remand the case for a ruling from the trial court on the motion to withdraw the plea.

Because "[t]he entry of a guilty plea involves the waiver of several important constitutional rights and because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted. State v. Gallegos, 738 P.2d 1040, 1041-42 (Utah 1987). See Grimmett v. State, 2007 UT 11, 10, 152 P.3d 306." State v. Ruiz, 2009 UT App 121, ¶ 11, 210 P.3d 955 (internal quotations omitted).

Defendants bear the burden of establishing grounds for the withdrawl. Id. But "that burden is relatively low in a presentence setting." Id. (citing State v. Gallegos, 738 P.2d at 1042 (suggesting that the decision for granting leave to withdraw a plea should turn on whether there is "a fair and just reason for granting leave to withdraw the plea")).

This Court recently explained the policy reasons in favor of liberally granting motions to withdraw guilty pleas:

> Under our case law, then and now, we do not think that trial courts are charged to liberally grant presentence motions to withdraw only as compared to post-sentence motions. Rather, the case law suggests that presentence motions should be liberally granted on their own terms because--in addition to the important constitutional rights at stake--prejudice to the State will not ordinarily arise in the short time between entry of the plea and the scheduled sentencing; delay will be minimal; and, most importantly, the motion will not be prompted by "buyer's remorse" upon learning that one's sentence is more severe than anticipated--a motive that has long been disapproved, and appropriately so.

Id. at ¶ 20.

In fact, this Court has reversed cases because the trial court failed to consider a defendant's motion to withdraw the plea on its merits or failed to continue sentencing to allow the filing of a written motion to withdraw the guilty plea. See, e.g., State v. Peterson, 2008 UT App 304 (memorandum decision) (finding the trial court should have allowed defendant to file a written motion); State v. Dawson, 2006 UT App 451 (memorandum decision) (court should have considered defendant's oral motion to withdraw on its merits).

There is no question that the motion to withdraw the plea should have been granted in this case. It was properly filed. It addressed substantive concerns with the entry of the plea and the representation of counsel. (R. 32-33.) The state would have suffered no prejudice in this case—the matter would have been set for trial. Such motions, as this Court has held, should be "liberally granted." State v. Ruiz, 2009 UT App 121, ¶ 11.

This case is not unlike the Peterson and Dawson cases. In both those cases, the defendant raised a motion to withdraw the plea orally at the court on the day of sentencing. See, State v. Peterson, 2008 UT App 304, State v. Dawson, 2006 UT App 451. The court not only denied the motions, but declined to allow the defendants an extension of time to properly file a written motion. Id. Though Peterson and Dawson were memorandum decisions, the proposition still stands that the trial court, when faced with a properly filed motion, has an obligation to address it. See also, Utah R. Crim. P. 12(e).

One issue is whether the defendant withdrew his motion to withdraw his guilty plea at the sentencing. His counsel stated that "there were no grounds" for the motion, that it dealt with the facts of the case and that "there's no question he understood what he was doing when he did that, so we're withdrawing" the motion. (R. 98:2.) The court then asked Mr. Baskins a compound question: "Is that what you want to do? I guess you had filled it out yourself or filed it on your own without your attorney?" (R. 98:3.) Mr. Baskins replied "Yes." Id. It is unclear from the record whether Mr. Baskins was

indicating that he wanted to withdraw his motion or whether he was answering that he had filled out the form himself. The nature of the compound question and Mr. Baskins' singular response could only engender confusion needing further clarification.

The trial court has the obligation to ensure that it was the defendant's wish to withdraw his motion. It could have done so by asking one additional question: whether he wanted to withdraw his motion. The failure to ask so was a clear denial of Mr. Baskins' right to due process as guaranteed by the United States and Utah Constitutions. U.S. Const. Amend. XIV; Utah Const. Art. I § 7. The defendant had expressed in his motion a clear conflict with his attorney and a clear misunderstanding of the plea deal. (R. 32-33.) Under those circumstances, the trial court needed to make sure the defendant, and not his counsel, wanted to withdraw the motion. But the question asked and the defendant's answer did not clearly identify whether it was the defendant's wish to withdraw his motion.[2] In fact, the record reflects the contrary.

The court questioned several times why the defendant pled guilty if he continued to maintain his innocence. (R. 98:12-13, 15, 17, 21-22.) The court took this as a negative factor for sentencing, when in reality, it should have taken it as evidence of the defendant's consistent maintenance of his innocence over the claimed pressures placed on him by his counsel. Id. It clearly supports defendant's own motion and is not

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[2] The defendant could have been answering one of three questions from the compound question asked. The defendant could have been saying that he wanted to withdraw his motion or he could have been saying that he filled in the motion or that he filed the motion himself.

consistent with someone who is choosing to withdraw his motion. Mr. Baskins' attorney was correct when he called this a "compromised plea" (R. 98:21), which should have been an indication to the court that the motion to withdraw the plea needed to be addressed.

In addition to the minimal standard of clarifying whether the defendant wanted to withdraw his motion, the court needed to address and deny the defendant's motion, making factual findings. The statute states that a defendant may withdraw his plea upon showing that the plea was not knowingly or voluntarily made. Utah Code Ann. § 77-13-6(2)(a).

> Once such evidence is presented to the court, ***the court needs to assess the credibility of the evidence and make detailed findings on all relevant facts***. See Id. Rule 12(c) of the Utah Rules of Criminal Procedure requires the trial court to state its findings on the record "where factual issues are involved in determining a motion." Furthermore, the trial court's findings must be sufficiently detailed to allow the appellate court the opportunity to adequately review the trial court's decision. See State v. Marshall, 791 P.2d 880, 882 (Utah Ct. App. 1990).

State v. Humphrey, 2003 UT App. 333, ¶ 10, 79 P.3d 960 (emphasis added).

In this case, the court made no inquiry, made no findings of fact, and did not confirm clearly with defendant that he was withdrawing his motion.

Nor was it proper to stand by defense counsel's representation alone that the motion needed to be withdrawn. First, defendant's motion represented a complete deterioration of the attorney-client relationship. (R. 32-33.) In fact, Mr. Baskins claimed

his counsel had "block[ed] my meaningful access to the court." Id. It was clear from the motion that defendant felt like his counsel prevented him from making the points he would like to make. At a minimum, the court needed to address that issue with Mr. Baskins and ask him if he were still comfortable with the representation he had. Secondly, defense counsel grossly misrepresented the contents of the motion to the court, stating it only had to do with the "facts of the case" and that there "was no question he understood what he was doing" when he pled. (R. 98:3.) The motion represented strong concerns about the communication and understanding of the plea agreement, a deterioration of the attorney client relationship and an assertion of innocence. (R. 32-33.) Counsel, who was not present at the entry of the plea, clearly did not understand either defendant's concerns or the confusion that took place at defendant's plea. It would be difficult for someone who was not at the plea hearing to assert that Mr. Baskins understood what he was doing at that hearing. But the court was present on both occasions and had an opportunity to clarify these issues and at a minimum, clarify that the defendant himself wanted to withdraw the motion.

Based on these reasons, and if this Court finds that the court erroneously failed to clarify whether Mr. Baskins wished to withdraw his plea, he asks that this Court remand the matter for a determination at the trial court as to whether Mr. Baskins wishes to withdraw his motion to withdraw his guilty plea and ultimately to make findings of fact concerning the substance of defendant's motion to withdraw the guilty plea.

CONCLUSION

Based on the foregoing, Mr. Baskins asks this Court to find, as a matter of law, that the plea was not entered into knowingly and voluntarily.

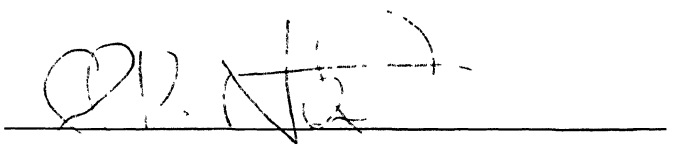
If not, Defendant asks this Court to find that the trial court improperly failed to consider Mr. Baskins' motion to withdraw his guilty plea and to remand the matter for further findings in the trial court.

RESPECTFULLY SUBMITTED this 21 day of JANUARY, 2010.

SAMUEL P. NEWTON
Attorney for the Defendant

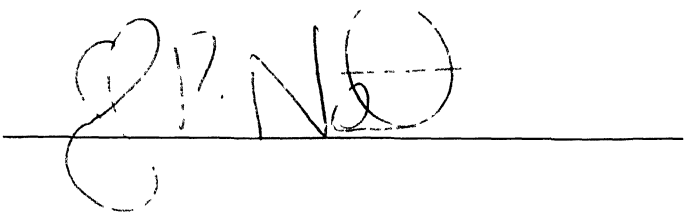
CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 29 day of January, 2010.



SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 29 day of January, 2010.



ADDENDUM

FILED
UTAH APPELLATE COURTS
FEB 0 2010

Utah R. Crim. P. R. 11

Utah R. Crim. P. R. 12

State v. Dawson, 2006 UT App 451 (memorandum decision)

State v. Peterson, 2008 UT App 304 (memorandum decision)

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each

offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the plea, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1)The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

Rule 12. Motions.

(a) Motions. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) Request to Submit for Decision. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) Time for filing specified motions. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least five days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information :

(c)(1)(B) motions to suppress evidence:

(c)(1)(C) requests for discovery where allowed:

(c)(1)(D) requests for severance of charges or defendants:

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least five days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least ten days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) Motions to Suppress. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application: and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Erick Alan Dawson, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20051037-CA F I L E D (November 9, 2006) 2006 UT App 451

Second District, Farmington Department, 031701191
The Honorable Thomas L. Kay

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Bench, Billings, and McHugh.

PER CURIAM:

Erick Alan Dawson entered a guilty plea to a single count of illegal possession of a controlled substance, a third degree felony. At sentencing, Dawson asked the court if he could withdraw his guilty plea. The district court ruled that Dawson had waived his right to withdraw his plea and that the time to make the motion had expired, stating:

> [O]nce you've entered a guilty plea, the time to file a Motion to Withdraw the Guilty Plea is prior to the time, it must be done in writing prior to the time of sentencing. This is the time of sentencing. We've begun sentencing and in the middle of sentencing you asked me to file it. I found that you waived your time to do so and it was not done in writing prior to today's sentencing.

Dawson claims that the district court misinterpreted Utah Code section 77-13-6(2)(b) by ruling that Dawson had waived his right to move to withdraw his guilty plea by not filing a written motion prior to the sentencing hearing. See Utah Code Ann. § 77-

13-6(2)(b) (Supp. 2006). The State agrees and the parties filed a joint motion for summary reversal. We grant that motion.

We agree that to the extent the court ruled on the motion to withdraw, its ruling was based on procedural grounds. Section 77-13-6(2)(b) provides that "[a] request to withdraw a plea of guilty . . . shall be made by motion before sentence is announced." Id. The plain language of section 77-13-6(2)(b) requires a motion to withdraw to be made before the sentence is announced; however, it does not support the district court's ruling that the motion must have been filed in writing before the sentencing hearing began. See id. In addition, rule 12(a) of the Utah Rules of Criminal Procedure requires motions to be in writing "unless made during a trial or hearing." Utah R. Crim. P. 12(a). Dawson orally moved to withdraw his guilty plea at the sentencing hearing but before announcement of the sentence. Under the plain language of section 77-13-6(2)(b), the motion was both properly made and timely. See Utah Code Ann. § 77-13-6(2)(b) (Supp. 2006). The district court should have considered the motion on its merits.

Accordingly, we grant the joint motion for summary reversal, vacate the sentence, and remand the case to the district court for consideration of the motion to withdraw the guilty plea on its merits, and for resentencing, as necessary.

Russell W. Bench,
Presiding Judge

Judith M. Billings, Judge

Carolyn B. McHugh, Judge

This memorandum decision is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Charles Brandon Peterson, Defendant and Appellant.	MEMORANDUM DECISION (For Official Publication) Case No. 20080115-CA F I L E D (August 14, 2008) 2008 UT App 304

Second District, Farmington Department, 071701864
The Honorable Michael G. Allphin

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and Orme.

PER CURIAM:

¶1 Charles Brandon Peterson pleaded guilty to one count of assault by a prisoner, a third degree felony, in violation of Utah Code section 76-5-102.5. See Utah Code Ann. § 76-5-102.5 (2003). At the change of plea hearing, the district court told Peterson that any motion to withdraw his guilty plea must be filed in writing prior to the date of sentencing. At sentencing, Peterson's counsel represented that Peterson wished to make a motion to withdraw his guilty plea after his review of the presentence investigation report. The district court responded:

> It has to be filed in writing prior to the day of sentencing, and he was told that at the day. I have nothing in the file to indicate that he's done that, so he doesn't have that option any longer.

Peterson's counsel then requested an extension of the time in which to file a written motion, which was not opposed by the prosecutor. The district court denied the request, stating:

> I think the statute is very clear. And if, in fact, he--any kind of a notification to

> the Court [sic.]. He could have handwritten it, and I would have accepted it. But for him to show up at the time of sentencing and say, no, I don't like the recommendation so I want to withdraw my plea, I'm going to deny the motion. We're going to go ahead with sentencing.

Peterson appeals the denial of his motion to withdraw his guilty plea, claiming that the district court misinterpreted Utah Code section 77-13-6(2)(b) by ruling that Peterson had waived his right to move to withdraw his guilty plea by not filing a written motion prior to the sentencing hearing. The State agrees, and this case is before the court on a stipulated motion for summary reversal.

¶2 The district court's denial was based on procedural grounds and not on consideration of the merits of any motion to withdraw. Section 77-13-6(2)(b) provides that "[a] request to withdraw a plea of guilty . . . shall be made by motion before sentence is announced." See Utah Code Ann. § 77-13-6(2)(b) (Supp. 2007). The plain language of section 77-13-6(2)(b) requires a motion to withdraw to be made before the sentence is announced; however, it does not support the district court's ruling that the motion must have been filed in writing before the sentencing hearing began. See id. In addition, rule 12(a) of the Utah Rules of Criminal Procedure requires motions to be in writing "unless made during a trial or hearing." Utah R. Crim. P. 12(a). Peterson orally moved to withdraw his guilty plea at the sentencing hearing, before announcement of the sentence. Under the plain language of section 77-13-6(2)(b), the motion was both properly made and timely. See Utah Code Ann. § 77-13-6(2)(b). The district court should have either considered the oral motion on its merits or continued sentencing to allow the filing of a written motion, as requested by Peterson.

¶3 Accordingly, we grant the stipulated motion for summary reversal, vacate the sentence, and remand the case to the district court for consideration of the motion to withdraw the guilty plea on its merits and for resentencing as necessary.

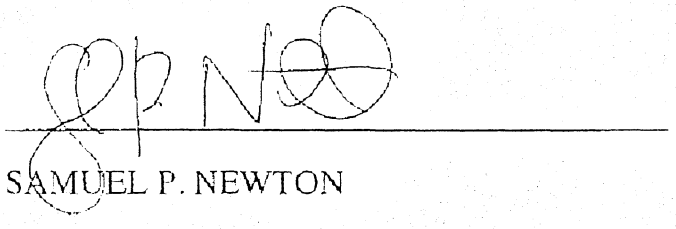
Russell W. Bench, Judge

James Z. Davis, Judge

Gregory K. Orme, Judge

CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2 day of February, 2010.



SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 2 day of February, 2010.